

AMENDED IN ASSEMBLY JULY 23, 2004

AMENDED IN ASSEMBLY JUNE 29, 2004

AMENDED IN SENATE MAY 20, 2004

**SENATE BILL**

**No. 1782**

**Introduced by Senator Aanestad**

February 20, 2004

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An act to add Section ~~11152.5~~ to the Health and Safety Code, and to add Section ~~1538.1~~ *11161.5* to the Penal Code, relating to medical crime.

LEGISLATIVE COUNSEL'S DIGEST

SB 1782, as amended, Aanestad. Medical crimes: investigation and prosecution.

Existing law provides that ~~a search warrant for property can issue only upon probable cause, supported by affidavit, particularly describing the property, thing, or things and the place to be searched, and requires the application for a warrant to specify, when applicable, that the place to be searched is in the possession or under the control of~~ a physician *and surgeon may prescribe or administer controlled substances to a person in the course of his or her treatment of that person for a diagnosed condition causing intractable pain. Existing law requires the Division of Medical Quality to develop standards for review of cases concerning management of a patient's pain using current authoritative clinical practice guidelines.* Existing law provides special procedures to protect the privacy of patient information and other privileged materials in the context of a search of a physician's records, when the physician is not reasonably suspected of involvement in criminal activity relating to those records.

~~This bill would make findings and declarations, and state the intent of the Legislature regarding its provisions. The bill would require before the filing of charges against a physician in connection with a physician's prescription of medication to patients that the prosecutor first request declarations under penalty of perjury of at least 2 qualified medical experts, as specified, that consider whether the physician did not exercise good faith medical judgment, did not meet the applicable standard of care, and demonstrated malice or demonstrated recklessness that requires the physician be deemed to have known the consequences of his or her actions. It would provide that the declarations are advisory and create no bar to prosecution. This bill would provide that a medical expert who provides a declaration shall not incur civil liability as a result of any statement contained therein. This bill would also, in the context of a criminal investigation of a physician, require that patient records taken pursuant to a warrant be copied by the officer seizing the records, would require those copies be provided by the officer to the physician or the physician's designee within 5 days, would require the officer by affidavit to indicate this has been done to the magistrate, and would provide for the magistrate to get copies to the physician or the physician's designee if the officer did not~~ *the Attorney General, on or before January 1, 2006, to collaborate with interested parties to develop protocols for the development and implementation of interagency investigations in connection with a physician's prescription of medication to patients. In addition, this bill would specify that the investigation protocol shall be designed to facilitate the timely return of medical records to a physician, as specified.*

~~By authorizing declarations by medical experts under penalty of perjury, expanding the scope of that felony offense, and by requiring certain acts and affidavits by officers who seek warrants and prosecutors who pursue the prosecution of physicians in connection with prescriptions, this bill would impose a state-mandated local program.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.~~



~~This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.~~

~~With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: ~~yes~~-no.

*The people of the State of California do enact as follows:*

1 SECTION 1. (a) The Legislature finds and declares that, for  
2 the past 20 years, medical journals have reported that when  
3 physicians fail to manage their patients' pain appropriately it is  
4 partially out of fear of criminal prosecution. It is the intent of the  
5 Legislature to alleviate this fear by providing for proper review of  
6 cases involving the prescription of pain medication before  
7 criminal charges are filed.

8 (b) It is the intent of the Legislature to encourage physicians to  
9 provide adequate pain management to patients in California  
10 consistent with Section 2241.5 of the Business and Professions  
11 Code, the Intractable Pain Treatment Act.

12 (c) It is the intent of the Legislature that, where patient records  
13 are seized in connection with criminal investigations, physicians  
14 should not be prematurely disabled from practicing medicine by  
15 not having access to their patient treatment records during those  
16 investigations. It is the further intent of the Legislature that, where  
17 medical records have been seized in a criminal investigation or  
18 prosecution, patients should have access to their medical records  
19 through their physicians to continue treatment.

20 SEC. 2. ~~Section 11152.5 is added to the Health and Safety~~  
21 ~~Code, to read:~~

22 ~~11152.5. (a) It is the intent of the Legislature that this~~  
23 ~~measure require a charging person or entity to consult with~~  
24 ~~qualified medical experts before criminal charges are filed in~~  
25 ~~connection with a physician's prescription of medications, as~~  
26 ~~specified, however no remedy is available for their failure to do so.~~

27 ~~(b) Before criminal charges are filed in connection with a~~  
28 ~~physician's prescription of medication to a patient, the charging~~  
29 ~~person or entity must first request declarations under penalty of~~

1 perjury of at least two qualified medical experts licensed by and  
2 in good standing with the Medical Board of California and with  
3 substantial current experience in the same specialty and practice  
4 setting as the prospective defendant.

5 (e) The declarations authorized by this section must consider  
6 all of the following:

7 (1) Whether the physician did not exercise good faith medical  
8 judgment.

9 (2) Whether the physician did not meet the applicable standard  
10 of care.

11 (3) Whether the physician demonstrated malice or  
12 demonstrated recklessness that requires the physician be deemed  
13 to have known the consequences of his or her actions.

14 (d) The declarations authorized by this section are only  
15 advisory and create no bar against prosecution. A charging person  
16 or entity may file and prosecute criminal charges in connection  
17 with a physician's prescription of medication to a patient  
18 regardless of whether the declarations received support  
19 prosecution, oppose prosecution, conflict with one another, or are  
20 not ultimately obtained.

21 (e) A medical expert who provides a declaration as authorized  
22 by this section shall not incur civil liability as a result of any  
23 statement contained in that declaration.

24 (f) The contents of a declaration made by a medical expert as  
25 authorized by this section shall not be the basis for a motion to  
26 dismiss notwithstanding failure to comply with the provisions of  
27 this section.

28 SEC. 3. Section 1538.1 is added to the Penal Code, to read:

29 1538.1. (a) Notwithstanding any other provision of law, all  
30 documents that are records of the identity, diagnosis, prognosis, or  
31 treatment of any patient that are taken by an officer pursuant to a  
32 warrant from a physician who is suspected of engaging or having  
33 engaged in criminal activity related to the documents must be  
34 copied by the officer, and the copies must be received within five  
35 days of the seizure by the physician or, if the physician is in  
36 custody, by the physician's designee.

37 (b) If records taken under a warrant are required to be copied  
38 pursuant to this section, the officer shall so indicate at the time of  
39 the return of the warrant, and shall deliver to the magistrate an  
40 affidavit no later than five days from the execution of the warrant

1 to the following effect: “I, \_\_\_\_\_, the officer by whom this warrant  
2 was executed, do swear that true and clear copies of all records of  
3 the identity, diagnosis, prognosis, or treatment of any patient that  
4 were taken under this warrant were delivered within five days of  
5 seizure to the physician who was subject of the search warrant or  
6 to that physician’s designee, if the physician is in custody.”

7 (c) ~~If no statement is received indicating that copies of these~~  
8 ~~records have been provided to the physician or the physician’s~~  
9 ~~designee within the time provided, the magistrate shall order that~~  
10 ~~copies be delivered to the magistrate within three days, and the~~  
11 ~~magistrate shall deliver the copies to the physician or the~~  
12 ~~physician’s designee within two days following their receipt by the~~  
13 ~~magistrate.~~

14 ~~SEC. 4. No reimbursement is required by this act pursuant to~~  
15 ~~Section 6 of Article XIII B of the California Constitution for~~  
16 ~~certain costs that may be incurred by a local agency or school~~  
17 ~~district because in that regard this act creates a new crime or~~  
18 ~~infraction, eliminates a crime or infraction, or changes the penalty~~  
19 ~~for a crime or infraction, within the meaning of Section 17556 of~~  
20 ~~the Government Code, or changes the definition of a crime within~~  
21 ~~the meaning of Section 6 of Article XIII B of the California~~  
22 ~~Constitution.~~

23 ~~However, notwithstanding Section 17610 of the Government~~  
24 ~~Code, if the Commission on State Mandates determines that this~~  
25 ~~act contains other costs mandated by the state, reimbursement to~~  
26 ~~local agencies and school districts for those costs shall be made~~  
27 ~~pursuant to Part 7 (commencing with Section 17500) of Division~~  
28 ~~4 of Title 2 of the Government Code. If the statewide cost of the~~  
29 ~~claim for reimbursement does not exceed one million dollars~~  
30 ~~(\$1,000,000), reimbursement shall be made from the State~~  
31 ~~Mandates Claims Fund.~~

32 *SEC. 2. Section 11161.5 is added to the Penal Code, to read:*

33 *11161.5. (a) On or before January 1, 2006, the Attorney*  
34 *General, in conjunction with interested parties, including, but not*  
35 *limited to, the California District Attorneys Association, the*  
36 *California Narcotic Officers’ Association, the California Police*  
37 *Chiefs’ Association, the California State Sheriffs’ Association, the*  
38 *California Medical Association, the American Pain Society, the*  
39 *American Academy of Pain Medicine, the California Society of*  
40 *Anesthesiologists, the California Chapter of the American College*

1 of Emergency Physicians, and other medical and patient advocacy  
2 entities specializing in pain control therapies, shall develop  
3 protocols for the development and implementation of interagency  
4 investigations in connection with a physician's prescription of  
5 medication to patients. The protocols are intended to assure the  
6 competent review of, and that relevant investigation procedures  
7 are followed for, the suspected undertreatment, undermedication,  
8 overtreatment, and overmedication of pain cases. Consideration  
9 shall be made for the special circumstances of urban and rural  
10 communities. The investigation protocol shall be designed to  
11 facilitate communication between the medical and law  
12 enforcement communities and the timely return of medical records  
13 pertaining to the identity, diagnosis, prognosis, or treatment of any  
14 patient that is seized by law enforcement from a physician who is  
15 suspected of engaging in or having engaged in criminal activity  
16 related to the documents.

17 (b) The administrative costs incurred by the Office of the  
18 Attorney General in administering this section shall be solicited  
19 and funded from nongovernmental entities.

